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# A “Party Satisfaction” Perspective on a Comprehensive Mediation Statute

CHRIS GUTHRIE AND JAMES LEVIN\*

## I. INTRODUCTION

During the past fifteen years, the alternative dispute resolution movement has greatly altered the legal landscape. Courts, legislatures and administrative agencies have enacted more than 2000 laws dealing with mediation and other dispute resolution processes.<sup>1</sup> The National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association Section of Dispute Resolution have recently formed a unique partnership to assess whether a model or uniform<sup>2</sup> mediation statute might remedy some of the problems caused by the current patchwork of often confusing and conflicting mediation laws.<sup>3</sup> The task of drafting a comprehensive mediation statute poses many challenges. The drafters must

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<sup>1</sup> See NANCY ROGERS & CRAIG MCEWEN, *MEDIATION: LAW, POLICY & PRACTICE* Appendix C (2d ed. 1994). We will use “law” to include statutes, court rules and regulations.

<sup>2</sup> To better understand the distinction between a “model” and a “uniform” statute, see James J. Brudney, *Mediation and Some Lessons From the Uniform State Law Experience* 13 OHIO ST. J. ON DISP. RESOL. 795 (1998). Because it is as yet unclear whether the collaboration between NCCUSL and the ABA will result in a model statute, a uniform statute, neither or both, we will use the term “comprehensive mediation statute” throughout this Article.

<sup>3</sup> Michigan law, for example, defines mediation differently in different contexts. In domestic relations cases, a Michigan statute defines mediation in the traditional way, that is, as a process in which the third-party neutral assists parties in formulating an agreement. See MICH. COMP. LAWS § 552.531 (1996). In medical malpractice cases, by contrast, a Michigan statute defines mediation as a panel of five members (three licensed attorneys and two health care professionals, one chosen by each party) that “make[s] an evaluation . . . [that] include[s] a specific finding on the applicable standard of care.” MICH. COMP. LAWS §§ 600.4905(1), 600.4915 (1996).

consider a number of criteria, e.g., efficiency, efficacy and justice, and a number of constituencies, e.g., parties, attorneys and the judicial system, when crafting the provisions of the act. Our task in this article is to focus on one criterion, satisfaction, and one constituency, parties.

We approach this task with two modest goals. First, we hope to provide a clear and concise understanding of the factors that promote party satisfaction with mediation. Thus, in the first part of this Article, the "understanding" part, we review the empirical research on party satisfaction<sup>4</sup> and propose three sets of factors that affect it: party expectations, process factors and outcome factors. Second, we hope to provide the drafters with guidance on how they might draft provisions to promote party satisfaction. Thus, in the second part of this Article, the "promoting" part, we examine, by way of example, how the drafters might craft three statutory provisions in light of the factors we have identified.

While we agree that the drafters should be "wary of using measures of satisfaction as a proxy for substantive fairness,"<sup>5</sup> we believe that party satisfaction is an essential criterion for the drafters to take into account. From utilitarian, market and therapeutic perspectives, party satisfaction might be the most important criterion for the drafters to consider.<sup>6</sup> We

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<sup>4</sup> Research on party satisfaction is less than a decade-and-a-half old. In 1984, McEwen and Maiman published what Galanter and Cahill call the "groundbreaking" party satisfaction study in Craig A. McEwen & Richard J. Maiman, *Mediation in Small Claims Court: Achieving Compliance Through Consent*, 18 L. & SOC'Y REV. 11 (1984). See Marc Galanter & Mia Cahill, *'Most Cases Settle': Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1356 (1994).

<sup>5</sup> Galanter & Cahill, *supra* note 4, at 1358; see also Lynn A. Kerbeshian, *ADR: To Be Or . . . ?*, 70 N.D. L. REV. 381, 400 (1994) ("Although client satisfaction is intuitively an important attribute of a successful process, it may be overrated. Satisfaction may be unrelated to the actual outcome or not based on a realistic appraisal of alternative solutions. Satisfaction may reflect avoidance of a less preferable alternative or distrust of the legal system."); David Luban, *The Quality of Justice*, 66 DENV. U. L. REV. 381, 404 (1989) (arguing that "participant satisfaction is an unacceptable criterion of quality of justice for four fundamental reasons: externality problems, sour-grapes phenomena (so-called 'adaptive preference formation') induced by attorneys cooling out their clients, distributional insensitivity, and informational poverty"); Joseph P. Tomain & Jo Anne Lutz, *A Model for Court-Annexed Mediation*, 5 OHIO ST. J. ON DISP. RESOL. 1, 13 (1989) (criticizing prior evaluations of mediation for "over-reliance on user satisfaction as a measure of effectiveness" because the reliability of such information "is questionable beyond the immediate satisfaction of the participants").

<sup>6</sup> See, e.g., Luban, *supra* note 5, at 403-404 (identifying utilitarian, market and

express no opinion in this Article on the relative merits of the various criteria that should be considered, but we strongly urge the drafters to consider party satisfaction, along with other important criteria, when drafting a comprehensive mediation statute.

## II. UNDERSTANDING PARTY SATISFACTION

Parties consistently report high levels of satisfaction with mediation.<sup>7</sup>

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therapeutic rationales for party satisfaction).

<sup>7</sup> Summarizing the research to date, Bullock and Gallagher report that "parties experience both a high level of satisfaction with mediation and good compliance, with agreement rates in the range of 60-90%. Such results, together with low levels of relitigation, are the *universal* finding in mediation studies." Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of the Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 921 (1997) (emphasis added); see also STEVENS H. CLARKE ET AL. COURT-ORDERED CIVIL CASE MEDIATION IN NORTH CAROLINA: AN EVALUATION OF ITS EFFECTS vii (1995) (reporting in their study of mediated settlement conferences in North Carolina that "most litigants did not participate in mediated settlement conferences, [but] those who did generally were quite favorable toward the conferences"); LINDA R. SINGER & ELEANOR NACE, MEDIATION IN SPECIAL EDUCATION: TWO STATES' EXPERIENCES 13 (1985) ("Based on interviews with parents and local school officials, it is clear that disputants overall are extremely satisfied with the mediation process. Although they are not always pleased with a particular mediator or a particular outcome, parents and representatives of school districts were uniformly positive in their evaluation of mediation."); Charlene E. Depner et al., *Client Evaluations of Mediation Services: The Impact of Case Characteristics and Mediation Service Models*, 32 FAM. & CONCILIATION CTS. REV. 306, 307 (1994) (reporting that "[s]tatewide prevalence data reveal widespread client satisfaction with court-based mediation services in California"); Joan B. Kelly, *A Decade of Divorce Mediation Research*, 34 FAM. & CONCILIATION CTS. REV. 373, 377-378 (1996) (reporting that "[w]ith one exception, all studies of divorce mediation in all countries and settings indicated that client satisfaction with both the mediation process and outcomes is quite high, in the 60% to 85% range"); Kenneth Kressel & Dean G. Pruitt, *Conclusion: A Research Perspective on the Mediation of Social Conflict*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 395-396 (1989) ("User satisfaction with mediation is typically 75 percent or higher, even for those who fail to reach a mediated agreement.").

Parties not only report high levels of satisfaction with mediation, but higher levels of satisfaction with mediation than with adjudication or arbitration. See generally Jeanne M. Brett et al., *Research Report, The Effectiveness of Mediation: An Independent Analysis of Cases Handled by Four Major Service Providers*, 12 NEGOTIATION J. 259, 265 (1996) (finding in their study that "respondents were more satisfied with every aspect of mediation than with arbitration"); Robert E. Emery &

Because parties enter mediation for any number of reasons and encounter a range of mediation experiences, they are likely to attribute their feelings of satisfaction to a wide variety of factors. Nevertheless, our review of the empirical research on party satisfaction<sup>8</sup> suggests that the following three sets of factors are primarily responsible for facilitating satisfaction with mediation: party expectations, process factors and outcome factors.

### A. Party Expectations

To assess subjective satisfaction with a process or event, an individual is likely to compare her actual experience with her prior expectations of that experience. If she determines that the actual experience meets or exceeds her prior expectations, she is more likely to feel satisfied than if she feels her expectations have not been met.

This general principle holds true in mediation. A party is likely to report high levels of satisfaction with mediation if it meets or exceeds her

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Joanne A. Jackson, *The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes*, 24 MEDIATION Q. 3, 11-12 (1989) (finding in child custody mediation that "[m]ediation clearly led to greater satisfaction in a large number of areas, including issues where adversary settlement would be expected to be superior (for example, feeling that one's rights were protected)"); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237, 256-267 (1981) (finding in their seminal small claims court study that "people whose cases were mediated expressed higher levels of satisfaction 'with their overall experience in mediation/court' than those whose cases were adjudicated: 66.6% of the former group indicated that they were completely or mostly satisfied compared to 54% of the latter"); Alan Slater et al., *Client Satisfaction Survey: A Consumer Evaluation of Mediation and Investigative Services: Executive Summary*, 30 FAM. & CONCILIATION CTS. REV. 252, 256 (1992) (finding in their study of Orange County, California's mandatory mediation program that "clients are generally more satisfied with parenting arrangements they determine on their own in mediation, and that they are generally more dissatisfied with court-imposed parenting plans"); Mark S. Umbreit & Robert B. Coates, *The Impact of Mediating Victim Offender Conflict: An Analysis of Programs in Three States*, 43 JUV. & FAM. CT. J. 21, 24-25 (1992) (finding that mediation "appears to have had a significant impact on increasing victim satisfaction with how the juvenile justice system handled their case"); James A. Wall, Jr. & Ann Lynn, *Mediation: A Current Review*, 37 J. CONFLICT RESOL. 160, 172-173 (1993) (reviewing mediation research conducted during the 1980s and early 1990s, the authors found that "mediation generally is more satisfying than adjudication or arbitration").

<sup>8</sup> Much empirical research on mediation, including much of the work on party satisfaction, suffers from methodological limitations. See, e.g., Emery & Jackson, *supra* note 7, at 9; Kerbeshian, *supra* note 5, at 399-400.

prior expectations. A party expecting mediation to save time and money, for example, will probably be satisfied with a mediation that results in a prompt and cost-effective settlement. By contrast, a party is likely to report relative dissatisfaction with mediation if it violates or otherwise falls short of her prior expectations. A party expecting a facilitative mediator, for example, will probably be dissatisfied with her mediation experience if the mediator is evaluative.

Thus, in the first instance, a party's satisfaction will depend on the expectations she brings with her to mediation and the extent to which the mediation process and outcomes meet those expectations.<sup>9</sup>

## B. Process Factors

The mediation *process* is distinct from other dispute resolution

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<sup>9</sup> Results from several studies provide empirical support for the important role that party expectations may play in promoting or thwarting party satisfaction with mediation. In her study of farmer-creditor mediation, for instance, Van Hook found that "everyone [i.e., farmers, creditors, and mediators] agreed that the mediator needed to provide information prior to the actual mediation session," though "[p]erspectives on specific issues . . . varied widely." Mary P. Van Hook, *Resolving Conflict Between Farmers and Creditors: An Analysis of the Farmer-Creditor Mediation Process*, 8 MEDIATION Q. 63, 67 (1990). Van Hook also found that "[p]eople with limited experience with mediation particularly needed information about what they could expect, because they tended to alternate between expecting too much or too little." *Id.* Results from the Denver Custody Mediation Project (CMP) and the Divorce Mediation Research Project (DMRP) provide additional empirical support for the importance of party expectations to party satisfaction with mediation. *See generally* Jessica Pearson & Nancy Thoennes, *Divorce Mediation: An Overview of Research Results*, 19 COLUM. J.L. & SOC. PROBS. 451 (1985). While most CMP and DMRP respondents expressed satisfaction with mediation, those with complaints seemed to be dissatisfied due to "faulty preconceptions about the mediation process." *Id.* at 466. Explaining the relevant data, Pearson and Thoennes noted that,

a number of respondents were under the impression that the process was designed to save the marriage. Those who had no interest in reconciling began the session feeling annoyed. Others, who were interested in reconciling, were upset that the mediators never urged their partner to give the marriage another chance. Other common erroneous beliefs were that the mediators would make the final custody decision and that mediation was merely another variety of counseling.

*Id.*; *see also* Mark S. Umbreit, *Crime Victims Seeking Fairness, Not Revenge: Toward Restorative Justice*, 53 FED. PROBATION 52, 55 (1989) (noting that "stating clear expectations for the mediation process" contributed to victim satisfaction with victim-offender mediation).

processes because the mediator, in contrast to a judge or arbitrator, is not authorized to impose a decision. Rather, the mediator is only authorized to oversee a process in which the parties are responsible for developing their own agreements. Many argue that it is this unique process that is largely responsible for party satisfaction with mediation.<sup>10</sup>

Parties report high levels of satisfaction with the mediation process for a number of reasons. First, the mediation process provides them with what the procedural justice literature calls "*process control*" or "the opportunity for meaningful participation in determining the outcome of the procedure (whatever it may ultimately be) and the opportunity for full self-expression."<sup>11</sup>

Early procedural justice researchers, notably John Thibaut and Laurens Walker, argued that parties valued process control primarily because it

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<sup>10</sup> See, e.g., Robert A. Baruch Bush, "What Do We Need a Mediator For?" *Mediation's "Value-Added" for Negotiators*, 12 OHIO ST. J. ON DISP. RESOL. 1, 19-20 (1996) (concluding based on his review of "evaluation studies" and "procedural justice studies" that "[p]arties' favorable attitudes toward mediation stem largely from how the process works . . ."); Jeanne A. Clement & Andrew I. Schwebel, *A Research Agenda for Divorce Mediation: The Creation of Second Order Knowledge to Inform Legal Policy*, 9 OHIO ST. J. ON DISP. RESOL. 95, 99 (1993) (finding that "research shows that mediation can enhance the likelihood that parties will be satisfied with the process used to settle their divorce"); Craig McEwen, *Note on Mediation Research*, in DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 155 (Stephen B. Goldberg et al. eds., 2d ed. 1992) (summarizing the research to date, McEwen notes that "[d]isputants engaged in mediation tend to be satisfied with the process and typically are more likely to be so than comparable litigants experiencing other processes such as trial or negotiation"); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 JUST. SYS. J. 420, 431 (1982) ("Looking across program evaluations, we consistently find that individuals who mediate are extremely pleased with the process whether or not they are able to generate an agreement."); Susan E. Raitt et al., *The Use of Mediation in Small Claims Courts*, 9 OHIO ST. J. ON DISP. RESOL. 55, 80 (1993) ("Data from programs in other states indicate that litigant satisfaction with ADR programs is even higher than the settlement rates would imply, suggesting that many litigants whose cases do not settle are nonetheless satisfied with the efforts."); Umbreit, *supra* note 9, at 55 ("The victims who participated in a mediation session with their offender indicated a very high level of satisfaction with the mediation process."); Roselle L. Wissler, *Mediation and Adjudication in the Small Claims Court: The Effects of Process and Case Characteristics*, 29 L. & SOC'Y REV. 323, 341 (1995) ("The mediation process, regardless of whether it resulted in a settlement, was evaluated as more fair and satisfying than trial. When assessing the mediation session, both the successful and unsuccessful mediation groups felt that the resolution process was more fair and were more satisfied with it than was the adjudication group.").

<sup>11</sup> Bush, *supra* note 10, at 18-19 (emphasis added).

allowed them to shape substantive outcomes.<sup>12</sup> According to this instrumental or "outcome-oriented"<sup>13</sup> view of process control, "the ultimate concern of disputants was obtaining a favorable outcome, and higher degrees of process control were valued because they seemed likely to improve the chances of such an outcome."<sup>14</sup>

More recent procedural justice researchers like E. Allan Lind and Tom Tyler, by contrast, argue that process control is valued primarily because it gives parties a chance to have a voice and to participate meaningfully in the process.<sup>15</sup> According to this intrinsic or "procedure-oriented"<sup>16</sup> view of process control, "the mere experience of an opportunity for expression will be seen as fair—there is no reference to the outcome of the procedure."<sup>17</sup>

Research provides ample empirical support for the importance of both the instrumental and the intrinsic<sup>18</sup> views of process control on party satisfaction with mediation. Parties who feel that mediation provides them with a voice, an opportunity to be heard, a chance to participate meaningfully and a chance to influence the process are likely to report high levels of satisfaction with mediation.<sup>19</sup>

<sup>12</sup> See generally, e.g., JOHN THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975).

<sup>13</sup> See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 96 (1988).

<sup>14</sup> Bush, *supra* note 10, at 18 n.30.

<sup>15</sup> See generally, e.g., LIND & TYLER, *supra* note 13.

<sup>16</sup> See *id.* at 96.

<sup>17</sup> *Id.*

<sup>18</sup> See *id.* at 101 ("[T]here is considerable evidence that the process control effect involves something beyond instrumental control that can be used to assure the favorableness or equity of outcomes. The opportunity to express one's own side of the story—is a potent factor in the experience of procedural justice."). According to Bush:

Despite what we might have thought, parties do not place the most value on the fact that a process provides expediency, efficiency or finality of resolution. Not even the likelihood of a favorable substantive outcome is considered more important. Rather, an equally, if not even more highly, valued feature is 'procedural justice or fairness,' which in practice means the greatest possible opportunity for *participation* in determining outcome (as opposed to assurance of a favorable outcome), and for self-expression and *communication*.

Bush, *supra* note 10, at 20–21.

<sup>19</sup> In her study comparing adjudication and mediation of small court claims, for instance, Wissler found that process control was a key ingredient of party satisfaction with mediation: "The features of the process that contributed to evaluations of the



A second process factor that contributes to party satisfaction with mediation is the perceived *fairness* of the process.<sup>20</sup> Most parties believe

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process as fair and satisfying included the sessions being thorough, open, providing disputants with an opportunity to tell their side of the story and with control over the presentation . . . ." Wissler, *supra* note 10, at 345. Wissler concluded that "consistent with the procedural justice literature, disputant control over the process was a major factor affecting assessments of the procedure and played a stronger role than outcome control." *Id.*; see also STEVEN HARTWELL & GORDON BERMANT, *ALTERNATIVE DISPUTE RESOLUTION IN A BANKRUPTCY COURT: THE MEDIATION PROGRAM IN THE SOUTHERN DISTRICT OF CALIFORNIA* 31 (1988) (attributing client satisfaction with mediation to "the opportunity mediation affords to speak without interruption and to talk directly to the opposition"); Bush, *supra* note 10, at 17 (noting that mediation evaluation studies show that "[s]ome of the most frequently given reasons" by parties to explain their satisfaction with mediation are that "mediation enabled the parties to deal with the issues they themselves felt important; it allowed them to present their views fully and gave them a sense of having been heard; [and] it helped them to understand each other"); William A. Donohue et al., *Mediator Issue Intervention Strategies: A Replication and Some Conclusions*, 11 *MEDIATION Q.* 261, 272 (1994) (finding in their study that "the absence of an opportunity to vent emotional concerns may have contributed significantly to decreased client satisfaction" with mediation); Kressel & Pruitt, *supra* note 7, at 396 (noting that research shows that "gratification at being able to state their own position" contributes to complainant satisfaction with mediation); McEwen & Maiman, *supra* note 7, at 256 (noting that "mediation does do more to vent frustration and anger and to dissipate it than does adjudication"); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 *JUST. SYS. J.* 420, 432 (1982) (noting that "William Felstiner (1980) reports that 8 to 14 months after mediating issues of assault, battery, and harassment in the Community Mediation Program in Dorchester, Massachusetts, most people are glad that they tried mediation (78%), think it helped their situation (50%) and *feel that they had an opportunity to air their complaints* (70%)") (emphasis added) (citing WILLIAM F. FELSTINER & LYNN WILLIAMS, *COMMUNITY MEDIATION IN DORCHESTER, MASSACHUSETTS* (1979-1980)); Pearson & Thoennes, *supra* note 9, at 464-465 (finding that party satisfaction depended in part on the opportunity to "air grievances" and to "express my own point of view"); Umbreit, *supra* note 9, at 55 (identifying "allowing both parties to express their feelings" as a key component of victim satisfaction with victim-offender mediation); Umbreit & Coates, *supra* note 7, at 25 (finding in victim-offender mediation that "[t]he opportunity to directly participate in an interpersonal problem solving process to establish a fair restitution plan was more important to victims than actually receiving the agreed upon restitution"); Van Hook, *supra* note 9, at 70 (finding that "the ability to help both parties present their case" was an important component of successful farmer-creditor mediation).

<sup>20</sup> "Consensual processes like mediation and negotiation offer a greater degree of process control, and hence they are seen by parties as 'subjectively fairer' and are preferred, regardless of whether they ultimately lead to favorable outcomes." Bush,

the mediation process is fair, regardless of how they define fairness, and this perception facilitates party satisfaction with mediation.<sup>21</sup> Moreover, research suggests that perceptions of fairness promote compliance with mediation agreements;<sup>22</sup> compliance, in turn, may increase the likelihood of party satisfaction with the process.

Finally, research suggests that party satisfaction with mediation is enhanced when the mediation process is noncoercive,<sup>23</sup> unbiased,<sup>24</sup>

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*supra* note 10, at 19; *see also* Clement & Schwebel, *supra* note 10, at 99 (reporting that research on divorce mediation shows that fairness is "important to satisfaction levels" and that "parties who engage in mediation are more likely than those who use litigation to rate the process and its outcomes as fair"); Tomain & Lutz, *supra* note 5, at 16 (attributing "user satisfaction" with court-annexed mediation in part to perceived fairness of the process); Umbreit, *supra* note 9, at 55 (identifying "fairness" as a key component of victim satisfaction with victim-offender mediation); Umbreit & Coates, *supra* note 7, at 25 (attributing victim satisfaction with victim-offender mediation in part to fairness); Wissler, *supra* note 10, at 341 ("The mediation *process*, regardless of whether it resulted in a settlement, was evaluated as more fair and satisfying than trial. When assessing the mediation session, both the successful and unsuccessful mediation groups felt that the resolution process was more fair and were more satisfied with it than was the adjudication group.").

<sup>21</sup> *See* Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367, 368 (1987).

<sup>22</sup> *See, e.g.,* Dean G. Pruitt et al., *Long-Term Success in Mediation*, 17 LAW & HUM. BEHAV. 313, 327 (1993) ("Respondents who felt that the mediation had been fair were more likely to comply with the agreement and to develop good relations with the complainant."); Tyler, *supra* note 21, at 368 (noting that "[l]itigants are more willing to comply voluntarily with decisions reached in ways that they believe are fair").

<sup>23</sup> *See, e.g.,* Wall & Lynn, *supra* note 7, at 172-173 (noting Vidmar's finding that "many parties will settle when exposed to the mediator's tactics, but they resent having the agreement forced on them" and Karim and Pagnetter's finding that "parties' satisfaction and mediation pressure are negatively correlated"); *see also* Depner et al., *supra* note 7, at 317 ("The prevalence statistics in this report offer no empirical support for the position that a broad base of clients is dissatisfied with the service when mediators are authorized to make recommendations to the court. Within a context of favorable evaluations, however, *client satisfaction with the mediation process was enhanced a few percentage points by the use of a mediation service model that does not authorize recommendations to the court . . .*") (emphasis added). *But see* Tomain & Lutz, *supra* note 5, at 16 (finding in their "preliminary analysis" of a court-annexed mediation program that "[a]ttorneys and clients alike have, on occasion, suggested that the mediator be more forceful in keeping the negotiation process alive by keeping parties at the bargaining table").

<sup>24</sup> *See, e.g.,* Bullock & Gallagher, *supra* note 7, at 923 (reporting that empirical studies have found that the "perceived neutral role of the mediator," among other

comprehensible,<sup>25</sup> informative,<sup>26</sup> attentive to party interests<sup>27</sup> and private.<sup>28</sup>

### C. Outcome Factors

While parties regularly rate the mediation *process* highly,<sup>29</sup> their evaluations of mediation *outcomes*, though generally favorable, are

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factors, enhances party "perceptions of the legitimacy of the dispute resolution process"); Nina R. Meierding, *Does Mediation Work? A Survey of Long-Term Satisfaction and Durability Rates for Privately Mediated Agreements*, 11 MEDIATION Q. 157, 163, 170 (1993) (finding "a high level of satisfaction" among parties to mediation where "89.3 percent of the men . . . and 94.9 percent of the women felt that the mediator was unbiased"); Tomain & Lutz, *supra* note 5, at 16 (attributing "user satisfaction" with court-annexed mediation in part to "unbiased" mediator); Van Hook, *supra* note 9, at 70 (finding that impartiality is an important component of successful farmer-creditor mediation).

<sup>25</sup> See, e.g., McEwen & Maiman, *supra* note 7, at 256 (identifying comprehensibility of the process as one of mediation's virtues); Wall & Lynn, *supra* note 7, at 172-173 (reporting that "disputants tend to be satisfied with mediation" in part because "it is understandable").

<sup>26</sup> See, e.g., Depner et al., *supra* note 7, at 307 (reporting that "[s]tatewide prevalence data reveal widespread client satisfaction with court-based mediation services in California" in part because "mediation provided information that was helpful in coming up with workable agreements for child custody and visitation"); Slater et al., *supra* note 7, at 257-258 ("Clients reported that it was most helpful for the mediator to provide: 1. Information about the children's developmental needs; 2. Descriptions of various parenting plans for children; and 3. An explanation of legal and physical custody. The emergent picture of the effective mediator became one who adopts the stance of information provider.").

<sup>27</sup> See, e.g., McEwen & Maiman, *supra* note 7, at 256-257 (reporting that mediation involved more attention to all of the issues than did adjudication); Pearson & Thoennes, *supra* note 9, at 464-465 (noting that 60-90% of the respondents in the CMP and DMRP studies "agreed that mediation helped them to focus on the needs of the children and that this was beneficial" and that parties expressed satisfaction with mediation's "ability to identify the real, sometimes underlying, issues in a dispute"); Wall & Lynn, *supra* note 7, at 172-173 (reporting that parties are satisfied with mediation in part because "it takes into consideration all aspects of the dispute").

<sup>28</sup> See, e.g., Bullock & Gallagher, *supra* note 7, at 923 (reporting that empirical studies have found that privacy, among other factors, enhances party "perceptions of the legitimacy of the dispute resolution process"); Kressel & Pruitt, *supra* note 7, at 396 (identifying privacy as a component of party satisfaction with mediation); McEwen & Maiman, *supra* note 7, at 256 (noting that privacy makes mediation "a less intimidating forum for airing a dispute").

<sup>29</sup> See *supra* note 10 and accompanying text.

mixed.<sup>30</sup> Nevertheless, two outcome factors, settlement and cost savings,<sup>31</sup> appear to contribute to party satisfaction with mediation.<sup>32</sup>

Although it is true that parties who fail to settle report surprisingly high levels of satisfaction with mediation,<sup>33</sup> those who do reach agreement tend to rate mediation more favorably than those who do not.<sup>34</sup> This could be the

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<sup>30</sup> While "litigants generally tend to be very satisfied with the process of mediation . . . [t]he results of studies examining satisfaction with the outcome of mediation . . . are not as clear." Galanter & Cahill, *supra* note 4, at 1356-1357. See generally John A. Goerdt, *How Mediation is Working in Small Claims Courts: Three Urban Court Experiments Evaluated*, 32 JUDGES J. 13, 14 (1993) (finding that "[l]itigants who went through mediation were much more likely to be satisfied, and much less likely to be dissatisfied, with the *outcome* of the case than litigants who went to trial" but that "[t]here was little difference between litigants who went to mediation and those who went to trial in the percentages of who were satisfied or dissatisfied with the courts' *procedures*"); Kelly, *supra* note 7, at 377-378 ("With one exception, all studies of divorce mediation in all countries and settings indicated that client satisfaction with both the mediation process and outcomes is quite high, in the 60% to 85% range."); Wissler, *supra* note 10, at 341 (finding that "[t]he mediation *process*, regardless of whether it resulted in a settlement, was evaluated as more fair and satisfying than trial" but that "[l]itigants in mediation and adjudication did not differ in their assessments of the fairness of and satisfaction with the *outcomes*").

<sup>31</sup> Although the research literature on "cost savings" focuses primarily on dollar cost savings, we construe the term cost savings to include the savings of time and emotional stress associated with protracted litigation.

<sup>32</sup> We believe that many parties, implicitly if not explicitly, evaluate these outcome factors not only on their own terms, but also relative to outcomes that they believe they would have obtained through litigation and/or negotiation. See, e.g., Roselle L. Wissler, *The Effects of Mandatory Mediation: Empirical Research on the Experience of Small Claims and Common Pleas Courts*, 33 WILLAMETTE L. REV. 565, 582 (1997) ("Parties rated as important the following reasons for agreeing to a settlement . . . *they thought the settlement was at least as good as the outcome they would get from a judge (36%)*."). (emphasis added).

<sup>33</sup> See, e.g., Kelly, *supra* note 7, at 377-378 (finding that though those who reached agreement were more satisfied with mediation than those who did not, "several studies found client satisfaction in the 40% to 60% range among those who were unable to reach agreement"); Pearson & Thoennes, *supra* note 9, at 463-464 (finding in divorce and child custody mediation that "individuals who mediate are extremely pleased with the process whether or not they reach an agreement").

<sup>34</sup> See CLARKE ET AL., *supra* note 7, at vii (reporting that plaintiffs who failed to reach agreement in mediation but "later reached a conventional settlement were even less satisfied with their entire cases than were those who went to trial"); MICHELE HERMANN ET AL., THE METROCOURT PROJECT FINAL REPORT 118 (1993) ("Claimants and respondents who reached agreement in mediation were far more likely to express

case for any number of reasons. Parties may simply be glad to end their disputes.<sup>35</sup> They may feel satisfied because they obtained what they perceived to be a good deal.<sup>36</sup> They may feel that the agreement reached through mediation met their underlying interests and needs in a way that other dispute resolution processes might not have.<sup>37</sup> Whatever the case, settlement enhances party satisfaction with mediation.

Not only do parties report higher levels of satisfaction with mediation when they settle, but they also find mediation more satisfying when it appears to result in cost savings.<sup>38</sup> When parties believe mediation has

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satisfaction with mediation outcomes than mediation disputants who had reached no agreement. Claimants and respondents who reached agreement also expressed greater satisfaction with mediation in the follow-up questionnaires than did mediation disputants who reached no agreement and went on to court.”); Clement & Schwebel, *supra* note 10, at 98 (“Case studies found that short and long-term satisfaction rates vary from eighty percent to one hundred percent, for parties who settle, and from fifty percent to eighty percent, for those who do not.”); Kelly, *supra* note 7, at 377–378 (finding in her summary of divorce mediation research that “satisfaction with mediation was higher among those who reached agreement than among those who did not”); Slater et al., *supra* note 7, at 255 (finding that “clients are most satisfied with the quality and helpfulness of mediation when they reach an agreement about parenting arrangements in mediation,” though “they are still generally satisfied with the quality of services” when they do not reach agreement); Van Hook, *supra* note 9, at 68 (finding that “[t]he most important activities were directly linked to the process of establishing a substantive agreement (clear statements of the agreements and clarification of the proposals)”); Wissler, *supra* note 32, at 587, 599 (finding in her study of voluntary and mandatory mediation in small claims court that “parties whose case did not settle were less satisfied with the mediation process than were those whose case settled” and that in her study of mandatory and voluntary mediation in common pleas courts in Ohio that “[s]ettlement was associated with more favorable ratings of mediation on many dimensions”).

<sup>35</sup> See, e.g., Wissler, *supra* note 32, at 582.

<sup>36</sup> See *id.*

<sup>37</sup> There is some evidence that parties may be more likely to obtain such agreements in mediation. See, e.g., Emery & Jackson, *supra* note 7, at 11 (“The content of the mediated and the litigated agreements [in child custody disputes] also differed significantly. Mediated agreements were more likely to stipulate joint legal custody and to be more specific regarding where and how the children’s time would be spent.”); McEwen, *supra* note 10, at 155–156 (“Outcomes of mediated agreements are likely to be somewhat different than outcomes achieved through negotiation or adjudication. These outcomes may include greater specification of settlement terms, non-monetary arrangements, and/or detailed conditions for implementation of the agreement.”).

<sup>38</sup> Empirical data regarding the relative financial cost of mediation is mixed.

saved them money, time or emotional costs that they would otherwise have spent, they tend to evaluate mediation quite positively.<sup>39</sup>

In sum, as Table 1 illustrates, existing research suggests that party satisfaction is largely a product of party expectations and party perceptions of process factors and outcome factors:<sup>40</sup>

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*See, e.g.,* JAMES S. KAKALIK ET AL., JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 20 (1996) ("We conclude that the mediation and neutral evaluation programs as implemented in these districts are not a panacea for perceived problems of cost and delay, but neither do they appear to be detrimental. We have no justification for strong policy recommendations because we found no major effects from them, either positive or negative. The finding that ADR has no significant effect on time or cost is generally consistent with the results of prior empirical research on court-related ADR."); Bullock & Gallagher, *supra* note 7, at 918-919 ("One study concluded that while initially there were neither substantial nor consistent cost savings to parties in divorce mediation, there was less relitigation and ultimately lower costs over time. Other studies have found mediation to be less costly than adjudication in neighborhood justice centers and in divorce cases. On the other hand, at least two studies of the neighborhood justice movement have found that mediation is not an efficient process."); Clement & Schwebel, *supra* note 10, at 99 (finding in divorce mediation that "[m]ediation can be less expensive than litigation . . . especially when some work is done in groups."); Kerbeshian, *supra* note 5, at 392 ("Significant cost savings with mediation have been documented, but other studies have reported only modest savings. Cost savings may depend on the type of dispute. Overall, successful mediation appears to save costs, while unsuccessful mediation does not necessarily increase costs."); McEwen, *supra* note 10, at 155 ("The very limited evidence we have indicates that when litigants settle through mediation, they often save money. When mediation is another step in the litigation process, it does not increase costs substantially."); Robert B. Moberly, *Ethical Standards for Court-Appointed Mediators and Florida's Mandatory Mediation Experiment*, 21 FLA. ST. U. L. REV. 702, 703 (1994) (citing KARL D. SCHULTZ, FLORIDA DISPUTE RESOLUTION CENTER, FLORIDA'S ALTERNATIVE DISPUTE RESOLUTION DEMONSTRATION PROJECT: AN EMPIRICAL ASSESSMENT viii (1990)) ("The most significant empirical work, in a legislatively funded study, indicated that mediation is 'faster, less expensive and fair to the parties and the attorneys.'").

<sup>39</sup> *See, e.g.,* Clement & Schwebel, *supra* note 10, at 99 (finding that costs are "important to satisfaction levels"); Barbara McAdoo & Nancy Welsh, *Does ADR Really Have a Place on the Lawyer's Philosophical Map?*, 18 HAMLINE J. PUB. L. & POL'Y 376, 388 (1997) ("Hennepin County [Minnesota] attorneys value ADR, and mediation in particular, because they perceive that it fosters earlier settlement, which, in turn, reduces litigation expenses."); Wall & Lynn, *supra* note 7, at 172-173 (reporting evidence that "disputants tend to be satisfied with mediation because it is inexpensive").

<sup>40</sup> In her review of the research on client satisfaction with mediation, Kerbeshian

TABLE 1 — FACTORS PROMOTING PARTY SATISFACTION		
PRE-MEDIATION	PROCESS	OUTCOME
Expectations	Process Control	Settlement
	Fairness	Cost savings
	Noncoercion	
	Unbiased	
	Comprehensible	
	Informative	
	Attentive to Party Interests	
	Private	

### III. PROMOTING PARTY SATISFACTION

From a party satisfaction perspective, a comprehensive mediation statute should consider party expectations as well as the process and outcome factors identified above. To shed more light on this general recommendation, we explore below how the drafters might analyze three different statutory provisions that, respectively, affect each of the three sets of party satisfaction factors we have identified.<sup>41</sup> First, we consider how the drafters might craft a “pre-mediation education” provision to ensure appropriate party expectations.<sup>42</sup> Second, we examine how the drafters

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identifies similar sets of factors that promote satisfaction with mediation. See Kerbeshian, *supra* note 5, at 385 (“Although satisfaction is not easily quantified or comparable among different individuals, data relates it to clients’ perceived control of the process, privacy, and the opportunity for expression of opinions. Satisfaction is also closely linked with clients’ perceptions of fairness . . .”).

<sup>41</sup> While we analyze each provision from the perspective of a particular set of factors, we recognize that a given provision is likely to affect more than one set of factors. For example, in Part III.C., we analyze how the drafters might craft a mediation-timing provision to promote outcome factors likely to lead to party satisfaction. We recognize that a mediation-timing provision is likely also to have some impact on process factors that may promote or hinder party satisfaction as well.

<sup>42</sup> See *infra* Part III.A.

might craft a "mediator selection" provision to promote some of the aforementioned process factors likely to enhance party satisfaction.<sup>43</sup> Third, we explore how the drafters might craft a "mediation timing" provision likely to facilitate outcome factors that will enhance party satisfaction.<sup>44</sup> While we focus, by way of example, on these three issues, we want to make clear that we believe the drafters should take the party satisfaction perspective into account when drafting any and all of the provisions of a comprehensive mediation statute.

### A. *Creating Realistic Party Expectations: Pre-Mediation Education*

Parties are more likely to be satisfied with mediation when it matches or exceeds their prior expectations.<sup>45</sup> From a party satisfaction perspective, the drafters of a comprehensive mediation statute should craft a pre-mediation education provision that increases the likelihood that parties will come to mediation with a clear understanding of the mediation process.

Existing pre-mediation education provisions generally tend to require courts, mediators or attorneys to provide descriptive information to the parties regarding the various forms of dispute resolution available in that jurisdiction.<sup>46</sup> Minnesota and Oregon, for example, require court administrators to provide such information at the time of filing.<sup>47</sup> Georgia

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<sup>43</sup> See *infra* Part III.B.

<sup>44</sup> See *infra* Part III.C.

<sup>45</sup> See *supra* Part II.A.

<sup>46</sup> Providing general descriptive information about dispute resolution processes appears to increase the likelihood that parties with a choice of processes will choose mediation. See, e.g., Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165, 1168-1169 (1992-1993) (quoting THE NATIONAL INSTITUTE FOR DISPUTE RESOLUTION, NATIONAL SURVEY FINDINGS ON: PUBLIC OPINION TOWARDS DISPUTE RESOLUTION 4-5 (1992)):

After explaining the distinctions between litigation, mediation, and arbitration, respondents were to imagine being in a dispute with someone while having hired a lawyer. The lawyer offered three options: go to court, go to an arbitrator, or go to a mediator. After learning about the responsibilities and duties of an arbitrator and a mediator, respondents show a strong inclination to use these two methods over the formal litigation process. Overall, 62% say they are likely to go to a mediator—32% somewhat likely: 30% very likely. Over half (54%) would likely go to an arbitrator, and only about one-third (34%) would be likely to go to court.

*Id.*

<sup>47</sup> See OR. REV. STAT. § 36.185 (1996); MINN. GEN. R. PRAC. § 114.03(a)



and Colorado require attorneys to consult with their clients regarding various dispute resolution processes, including mediation.<sup>48</sup>

While we applaud these efforts, we contend they do not go far enough to ensure that parties have the amount and type of pre-mediation information likely to promote their eventual satisfaction with the mediation experience. We therefore believe that the drafters should impose more elaborate pre-mediation education obligations on both courts and mediators.

### 1. Courts

In the civil litigation system, courts are the guardians of the dispute resolution process and protectors of disputants' due process rights. Given these dual roles, we believe a comprehensive mediation statute should require courts to provide pre-mediation information regarding the role of mediation in the litigation process and the parties' due process rights.<sup>49</sup> While the drafters might recommend that courts provide this information in a variety of ways, we believe the drafters should encourage courts to attach this information to the court order to mediate.<sup>50</sup> This would impose a

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(1996). Oregon also requires the courts to provide information on established court mediation opportunities. *See* OR. REV. STAT. § 36.185. Missouri Supreme Court Rule 17, requires those courts or judges that have developed early dispute resolution programs to provide all parties to an action with a notice of available dispute resolution processes and a list of available service providers. *See* MO. SUP. CT. R. 17.03.

<sup>48</sup> *See* COLO. R. PROF. CONDUCT R. 2.1 (1993) ("[A] lawyer should advise the client of alternative forms of dispute resolution which might reasonably be pursued to attempt to resolve the legal dispute or to reach the legal objective sought."); GA. CODE PROF. RESP. 3-107, Ethical Consideration 7-5 (1993) ("A lawyer as advisor has a duty to advise the client as to various forms of dispute resolution.").

<sup>49</sup> *See generally* Margaret Shaw et al., *National Standards for Court-Connected Mediation Programs*, 31 FAM. & CONCILIATION CTS. REV. 156, 172-173 (1993) (recommending that parties be provided with procedural information regarding (1) the purpose of mediation; (2) confidentiality of process and records; (3) the role of the parties and/or attorneys in mediation; (4) the role of the mediator, including lack of authority to impose a solution; (5) voluntary acceptance of any resolution or agreement; (6) the advantages and disadvantages of participating in determining solutions; (7) enforcement of agreements; (8) availability of formal adjudication if a formal resolution or agreement is not achieved and implemented; (9) the way in which the legal and mediation processes interact, including permissible communications between mediators and the court; and (10) the advantages and disadvantages of a lack of formal record).

<sup>50</sup> Or better yet, courts could provide this information, along with similar information regarding other dispute resolution processes, at the time a case is filed.

nominal burden on the courts, and any burden imposed would be outweighed by the benefits associated with providing parties with a clear understanding of mediation.

## 2. Mediators

Mediators are charged with managing the mediation process. Given this role, we believe a comprehensive mediation statute should require a mediator to disclose detailed information regarding the mediation process and the mediator's view of the roles and responsibilities of the parties *and* the mediator.<sup>51</sup> Again, we recognize that a statute or rule could direct mediators to provide this information in a variety of ways. We recommend, however, that the statute direct mediators to incorporate this information into an "Agreement to Mediate" form provided to the parties in advance of the mediation.<sup>52</sup> The parties and mediator would then sign the Agreement to

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<sup>51</sup> Ellen Waldman recently identified five "multifarious methodologies" or styles that theorists have developed to categorize the many methods mediators use to help parties reach agreement. These include: (1) broad versus narrow (citing Leonard Riskin, *Two Concepts of Mediation in the FMHA's Farmer-Lender Mediation Program*, 45 ADMIN. L. REV. 21, 44 (1993)); (2) principle based versus interest based (citing NANCY NEVELOFF DUBLER & LEONARD J. MARCUS, *MEDIATING BIOETHICAL DISPUTES* (1994)); (3) settlement versus recognition oriented (citing ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 28-32 (Jeffrey Rubin ed., 1994)); (4) problem solving versus adversarial (citing Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795-801 (1984)); and (5) facilitative versus narrow (citing Leonard Riskin, *Mediators' Orientations, Strategies, and Technique*, 12 ALTERNATIVES TO HIGH COST LITIG. 111, 111-113 (1994)). She then sets out her own typology by identifying the following three mediation models: norm-generating, norm-educating and norm-advocating. See Ellen Waldman, *The Challenge of Certification: How To Ensure Mediator Competence While Preserving Diversity*, 30 U.S.F. L. REV. 723, 729 (1996). For an elaboration on Waldman's typology, see generally Ellen Waldman, *Identifying the Role of Social Norms in Mediation: A Multiple Model Approach*, 48 HASTINGS L.J. 703 (1997).

<sup>52</sup> We believe that North Carolina has done a commendable job of listing the type of information a mediator should share with the participants prior to a mediation. The relevant rule requires the mediator to define and describe the following at the beginning of the conference:

- (a) The process of mediation;
- (b) The differences between mediation and other forms of conflict resolution;
- (c) The costs of the mediated settlement conference;
- (d) The fact that the mediated settlement conference is not a trial, the mediator is

Mediate form at the beginning of the first session to ensure sufficient party understanding of the process.<sup>53</sup>

Because party satisfaction with mediation will likely be enhanced if parties have a clear expectation regarding the mediation process and where it fits within the broader dispute resolution system, we encourage the drafters to place the burden of pre-mediation education requirements on the courts and mediators.

### *B. Promoting Process Satisfaction: Mediator Selection*

Parties are more likely to be satisfied with mediation if it gives them process control.<sup>54</sup> From a party satisfaction perspective, the drafters of a comprehensive mediation statute should create a "mediator selection" provision that vests as much process control as possible in the hands of the disputing parties.<sup>55</sup> Specifically, we recommend that the drafters enact a "party-choice" mediator selection provision.

Existing mediator selection provisions take one of the following three forms: "court-choice," "mixed-choice" or "party-choice." Court-choice provisions deprive the parties of process control by vesting all mediator selection power in the courts. The U.S. District Court for the Eastern District of Pennsylvania, for example, specifies that "[t]he mediation shall be conducted by a mediator selected at random by the Clerk of Court from

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not a judge, and the parties retain their right to trial if they do not reach settlement;

(e) The circumstances under which the mediator may meet and communicate privately with any of the parties or with any other person;

(f) Whether and under what conditions communications with the mediator will be held in confidence during the conference;

(g) The inadmissibility of conduct and statements as provided by G.S. 7A-38.1(l);

(h) The duties and responsibilities of the mediator and the participants; and

(i) The fact that any agreement reached will be reached by mutual consent.

N.C. SUP. CT. MEDIATED SETTLEMENT CONF. R. 6B(1).

<sup>53</sup> Additionally, we believe that mediators should be required to notify parties in advance, if possible, so that they can contact the mediator prior to the first session to clarify procedural questions that may arise.

<sup>54</sup> See *supra* Part II.B.

<sup>55</sup> A statutory provision dealing with choosing a mediator is only necessary, of course, if there is a mandatory mediation program in place. Parties who voluntarily opt for mediation have complete control over choosing the mediator.

the list of certified mediators."<sup>56</sup>

Mixed-choice provisions offer parties a modicum of process control by giving both the parties and the court authority to select a mediator. Some mixed-choice provisions authorize the parties to choose from a small list of mediators selected by the court. The United States District Court for the Northern District of Ohio, for example, requires the parties to rank three mediators proposed by the court.<sup>57</sup> The court then "[c]hoose[s] one party's list at random and 'strike[s]' the least preferred name on that list from consideration,"<sup>58</sup> then reviews "the other party's list and 'strike[s]' the least preferred remaining name on that list from consideration,"<sup>59</sup> and finally, "[s]elect[s] the remaining name as the Mediator."<sup>60</sup> Other mixed-choice provisions give the parties the right to select the mediator but allow the court to participate if the parties cannot agree. The Florida Rules of Civil Procedure, for example, authorize the parties to select the mediator.<sup>61</sup> The court may intervene and "appoint a certified mediator selected by rotation or by such other procedures as may be adopted by administrative order . . ." only "[i]f the parties cannot agree upon a mediator."<sup>62</sup>

In contrast to the court-choice and mixed-choice mediator-selection provisions, the party-choice provisions vest essentially all decision-making power in the parties and are thus more likely to promote party satisfaction. Indiana, for instance, gives parties the authority to select a mediator.<sup>63</sup>

<sup>56</sup> U.S. D. Ct., E.D. PA. Loc. R. 53.2.1(4)(B).

<sup>57</sup> See U.S. D. Ct., N.D. OH. R. 16.6(c)(1).

<sup>58</sup> *Id.* at 16.6(c)(1)(A).

<sup>59</sup> *Id.* at 16.6(c)(1)(B).

<sup>60</sup> *Id.* at 16.6(c)(1)(C).

<sup>61</sup> See FLA. R. CIV. P. 1.720(f)(1).

<sup>62</sup> *Id.* at 1.720(f)(2); see also W.VA. R. P. FOR COURT-ANNEXED MEDIATION R. 5:

Within fifteen (15) days after entry of an order or stipulation referring a case to mediation, the parties, upon approval of the court, may choose their own mediator, who may or may not be a person listed on the State Bar listing. In the absence of such agreement, the court shall designate the mediator from the State Bar listing, either by rotation or by some other neutral administrative procedure . . . .

*Id.*; MINN. GEN. R. PRAC. 114.05 ("If the parties are unable to agree on a neutral, or the date upon which the neutral will be selected, the court shall appoint the neutral . . .").

<sup>63</sup> See IND. A.D.R. R. 2.4 ("Upon an order referring a case to mediation, the parties may within seven (7) days in a domestic relations case or within fifteen (15) days in a civil case: (1) choose a mediator from the Commission's registry, or (2) agree

Then, if the parties cannot agree on a mediator, the court steps in, but it does not substitute its judgment for theirs. Rather, the court provides a list of three mediators, and each side gets to exclude one.<sup>64</sup> The remaining mediator conducts the mediation.<sup>65</sup> Thus, parties, not the court, make essentially all of the mediator-selection decisions.

Because process control contributes to party satisfaction with mediation, we encourage the drafters of the comprehensive mediation statute to draft a mediator selection provision that maximizes party process control. Specifically, we recommend that the drafters create a provision that empowers the parties to make the mediator-selection decisions.<sup>66</sup>

### *C. Promoting Outcome Satisfaction: Mediation Timing*

Parties are more likely to be satisfied with mediation if they can settle their disputes efficiently.<sup>67</sup> From a party satisfaction perspective, the drafters of a comprehensive mediation statute should create a "mediation timing" provision that encourages mediation to occur at that point in the process when cost-effective settlements are most likely to take place,<sup>68</sup> though not so early in the process that parties are coerced into making uninformed decisions.<sup>69</sup>

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upon a non-registered mediator, who must be approved by the trial court and who serves with leave of court.").

<sup>64</sup> See *id.* ("In the event a mediator is not selected by agreement, the court will designate three (3) registered mediators from the Commission's registry who are willing to mediate within the Court's district as set out in Admin R. 3(A). Alternately, each side shall strike the name of one mediator. The side initiating the lawsuit will strike first.").

<sup>65</sup> See *id.* ("The mediator remaining after the striking process will be deemed the selected mediator.").

<sup>66</sup> We recognize that in some circumstances parties' attorneys, rather than the parties themselves, may make some or all of the mediator-selection decisions in a given dispute. Because attorneys operate as parties' surrogates, however, we believe party process control, and satisfaction with mediation, is still enhanced. Nevertheless, we acknowledge, though we do not address here, the agency issues this raises.

<sup>67</sup> See *supra* Part II.C.

<sup>68</sup> Of course, this question will be answered differently given the context of the litigation. Matters that come to a housing court, small claims court or family court often have expedited timelines for varying reasons. Unless otherwise stated, this Part will deal with the types of cases that would appear on a general civil docket.

<sup>69</sup> See, e.g., KAKALIK ET AL., *supra* note 38:

States take at least three approaches to mediation timing. Many states with mandatory mediation provisions follow a "trigger" approach. These states do not specify when mediation is to occur. Rather, the courts in these states order mediation *sua sponte* or upon a party's motion at any time during the litigation process, and mediation deadlines are then triggered by that order. Florida, for example, requires the parties to hold their first mediation session within sixty days of the court's order and to complete mediation within forty-five days after commencement.<sup>70</sup> The problem with trigger provisions is that they may result in delaying mediation until so late in the process that parties do not save costs, an outcome factor that promotes party satisfaction.<sup>71</sup> Parties also lose the benefits of early *unsuccessful* mediation, which, by providing insights into the underlying issues of the case, the needs of each party and the strengths and weaknesses of each party's case, may promote a focused discovery process and subsequent settlement.

Other states take an "early deadline" approach. The United States District Court for the Eastern District of Pennsylvania, for instance, requires parties to hold their first mediation session within sixty days of the filing of the first appearance of the defendant.<sup>72</sup> The problem with the early deadline approach is that it may force parties to negotiate a settlement before they have sufficient information to make informed choices.

The third approach seeks to balance the parties' desire for cost savings and the parties' need for sufficient information to make informed choices. The United States District Court for the Northern District of Ohio, for example, allows a case to proceed to mediation "[w]hen the status of discovery is such that the parties are generally aware of the strengths and

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The problem cited most often by lawyers and ADR providers was that the parties were not ready to settle when the ADR session was held. The timing of the ADR session could be a major factor in this lack of 'readiness.' It may be best to conduct the sessions in an atmosphere where at least the basic facts and positions are known to both sides and to the ADR provider as well. Substantial numbers of lawyers in some districts felt that the sessions were held too early to be useful.

*Id.* at 20.

<sup>70</sup> See FLA. R. CIV. P. R. 1.710(1).

<sup>71</sup> See, e.g., McAdoo & Welsh, *supra* note 39, at 386-387 (reporting that a majority of lawyers in a trigger provision jurisdiction found that mediation did not limit the amount of time spent on discovery or the volume of discovery conducted).

<sup>72</sup> See U.S. D. CT., E.D. PA. CIV. R. 53.2.1(4). This rule, adopted under a mandate from the Civil Justice Reform Act of 1990, 28 U.S.C. § 471 *et seq.*, applies to all "odd-numbered civil cases" with only limited exceptions. *Id.* at 53.2.1(3).

weaknesses of the case.”<sup>73</sup> We encourage the drafters to craft a “strengths and weaknesses” provision, coupled with a presumptive deadline<sup>74</sup> tied to the discovery schedule set by the court, so that mediation will take place soon after the onset of written discovery but before depositions and other subsequent (and expensive) discovery procedures have taken place.<sup>75</sup> This type of provision, we submit, is most likely to promote outcomes that lead to party satisfaction with mediation because it appropriately balances parties’ desires for cost savings and well-informed decision making.

#### IV. CONCLUSION

Though just one of the many important factors that the drafters of a comprehensive mediation statute must consider, party satisfaction is particularly significant. We hope that we have aided the drafters both by providing a clear and concise conception of party satisfaction and by identifying, both generally and by example, how the drafters might craft statutory provisions that increase the likelihood that parties leave mediation

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<sup>73</sup> U.S. D. Ct., N.D. OH., R. 16.6(b)(1)(A); see also Edward Sherman, *The Impact on Litigation Strategy of Integrating Alternative Dispute Resolution into the Pretrial Process*, 168 F.R.D. 75 (1996):

In an informal process in which the role of the neutral is primarily facilitative (like mediation), full discovery of the facts may not be necessary since no formal presentation of evidence will be made. It may be possible for the parties to resolve the dispute by addressing less than all the issues or having less than all discovery that might be needed for trial.

*Id.* at 82.

<sup>74</sup> See, e.g., NATIONAL STANDARDS FOR COURT-CONNECTED MEDIATION R. 4.7 (“Courts should establish presumptive deadlines for the mediation process, which may be extended by the court upon a showing by the parties that continuation of the process will assist in reaching resolution.”); Shaw et al., *supra* note 49, at 4–5. We believe creating the impetus to move more quickly is important because attorneys—especially attorneys who do not understand or appreciate the mediation process—may be more apt to delay the mediation until the expensive and time-consuming task of discovery is complete. See, e.g., McAdoo & Welsh, *supra* note 39, at 386–387. If such delay should happen, the perception that mediation saves costs—a primary source of party satisfaction—will be diminished.

<sup>75</sup> See Sherman, *supra* note 73, at 82 (“In an informal process in which the role of the neutral is primarily facilitative (like mediation), full discovery of the facts may not be necessary since no formal presentation of evidence will be made. It may be possible for the parties to resolve the dispute by addressing less than all the issues or having less than all discovery that might be needed for trial.”).

## **A "PARTY SATISFACTION" PERSPECTIVE**

**feeling satisfied with the experience.**



